Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]12

LOUIS H. EBERLEIN,

Appellant,

against

THE UNITED STATES.

Appellant's Brief

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LOUIS H. EBERLEIN, Appellant, vs. THE UNITED STATES.	No. 170.

APPELLANT'S BRIEF.

Statement of the Case.

1.

This is an appeal from a judgment of the Court of Claims dismissing appellant's petition. Louis H. Eberlein, the appellant, was appointed a United States Storekeeper in the customs service at the port of New York on March 1st, 1909, having prior thereto been an assistant weigher of customs. Both of these positions were under the classified civil service. He received the salary of $1,400 per annum upon his appointment as storekeeper but was promoted to $1,600 per annum on January 10th, 1910. He continued to hold this

position until May 9th, 1910, when he was suspended from duty and pay under charges that he had accepted money from importers in 1904 for underweighing dutiable merchandise. Written charges were served upon him at the time of his suspension and he was allowed three days in which to submit his answer thereto. He submitted a sworn answer on May 11th, 1910, denying each and every one of the charges and requested a hearing. A hearing was denied him and he was removed from the service on May 26th, 1910 (R., 4, 5, 6).

2.

The charges against Eberlein were preferred by the Collector of Customs at the instance of the Attorney-General's office, then investigating the "sugar frauds" in the port of New York. Prior to, and after his removal, appellant made repeated efforts to obtain a hearing, strenuously asserting and offering to prove that he was entirely innocent of the charges. He met with no success, however, as the Treasury Department refused to grant the hearing requested. He filed applications for re-instatement but was unable to make any progress until he succeeded in getting his case presented to the then Attorney-General, Hon. George W. Wickersham. Upon the recommendation of the latter, a hearing was finally accorded appellant before the Surveyor of Customs of the port of New York during the month of May, 1912. Then and there, appellant established his innocence and the Surveyor so found and reported to

the Treasury Department and to the Attorney-General. On June 11th, 1912, the Attorney-General addressed a letter to the Secretary of the Treasury advising that a mistake had been made in Eberlein's case and recommending his re-instatement. No action was taken upon this recommendation and the case was finally brought to the attention of the President in October, 1912, who caused a further investigation to be made and, upon the completion thereof, issued an Executive order directing the re-instatement of appellant. The re-instatement to his position as storekeeper took place on December 16th, 1912 (R., 5, 6, 7).

3.

This suit was thereafter brought for the recovery of the salary of the office of storekeeper during the period of removal, at the rate of $1,600 per annum, this being the salary received by appellant at the time of both the removal and the re-instatement. The amount thereof is $4,164.44 (R., 1-6).

4.

There is really only one question presented for review to this Court. The record shows conclusively and beyond controversy that appellant was removed by the proper authority, the appointing power, and in accordance with the rules of procedure. The record is equally convincing that the

appointing power, subsequent to the removal, *reviewed its own prior act* (a right unquestionably possessed) and decided that appellant had been wrongfully and unjustly removed from the service and thereupon re-instated him. The question is, therefore: Is appellant entitled, by virtue of his acquittal of the charges and his re-instatement to his position, to the salary of his office during the period of removal? Or to put the query another way. Did the re-instatement restore the title and rights of his office to appellant, *ab initio?* We must bear in mind that appellant was *re-instated* and not *re-appointed*.

This court is not being called upon in any way to review the exercise of a discretionary power by the executive branch of the government. That branch did its own reviewing in the instant case but it lacked the power to restore to appellant anything more than the title to his office. The emoluments thereof may only be restored by the Courts or possibly by the legislative branch. The injury to the good name and reputation of appellant, suffered by him as the inevitable result of his removal on charges so serious, can never be remedied by any power of the government.

The Record Below.

The petition was filed in the court below on May 25th, 1916 (R., 1). A general traverse to the petition was duly entered (R., 4). The case was argued and submitted on March 6, 1918 (R., 4). Findings of fact and conclusions of law and opinion of the court were filed on May 27, 1918 (R.,

4). Petition was dismissed on May 27, 1918 (R., 8). Appellant filed a motion on June 5, 1918, to amend the findings (R., 8). On June 17, 1918, motion to amend findings was overruled (R., 8). Application for appeal was made on July 12, 1918, and allowed July 16, 1918 (R., 9).

Assignment of Errors.

The court below erred:

1. In dismissing the petition.

2. In not rendering judgment for the petitioner in the sum of $4,164.44.

BRIEF OF ARGUMENT.

I.

Appellant was unjustly removed.

The rules of procedure governing removals were followed in this case, but, nevertheless, there was no just cause for removal.

It is not contended on behalf of appellant that any rule or regulation was violated in the proceedings that led to his separation from the service. While it is true that he was denied a hearing upon the grave charges made against him, yet it was discretionary with the appointing power to grant or refuse same. We take no exception to this refusal, as we recognize the rule that the courts will not review the exercise of a discretionary power by the executive branch of the Gov-

ernment. However, in this case, the appointing power *reviewed its own act* and in the face of irrefutable evidence decided that appellant had been unjustly removed from the service and thereupon reinstated him to his former position.

Article 1385 of the Customs Laws and Regulations of 1908 provides in part "no removal shall be made from any position subject to competitive examination except for *just cause*" (italics ours). Had Eberlein not been reinstated, it is conceded that the courts would not have intervened in his behalf because to have done so would have necessitated the review of an administrative act. The fact is, though, that he was reinstated by the same power that removed him. It may be that the appointing power thought that there was "*just cause*" at the time of the removal, but it is to be remembered that this same power later *established and found as a fact* that there was no *just cause*—that a grievous mistake had been made—that an innocent man had suffered from the general atmosphere of his surroundings, as the Attorney General expressed it. We think it follows that the removal was unlawful because it was unjust. We think that the word "lawful" imports something more than a mere compliance with regulated procedure—that it refers to the substance and not simply to the form, as the court below seems to argue. We find it difficult to believe that a removal may be unjust but lawful—to so believe implies that law and justice do not go hand in hand. The court below says "the innocence of the plaintiff must also be conceded, not that it is by the defendants; nevertheless, the record precludes a contrary assertion" (R., 7).

II.

Appellant was reinstated and not reappointed.

Had appellant received a reappointment instead of a reinstatement a different question might be presented.

The record is clear that appellant was reinstated and not reappointed. The difference between the two words is manifest. The first imports a restoration to the *same* status enjoyed previous to the removal. The latter does not convey the same idea at all. A reappointment might be to a different position altogether. In this case Eberlein was reinstated and by the same Secretary of the Treasury who had previously removed him. We take it that the order of reinstatement restored to appellant the legal title to his office which had been unjustly taken from him and swept his whole record clear of the charges and their consequences. To give him back his office merely and to deny him the right to the salary that was attached thereto as an incident thereof would not amount to a restoration. Through no fault of his own, this appellant was prevented for more than two years from performing the duties of his office, but his right to the emoluments thereof was established when he was reinstated.

III.

Appellant is entitled to the salary of his office during the period of removal.

The salary of a public office is payable, not by force of any contract, but because the law attaches it to the office and he who holds the legal title thereto is entitled to the salary as an incident thereof.

The court below holds that this case seems to be *sui generis*. We do not agree with this view and submit that the case of *Fitzsimmons* vs. *Brooklyn*, 102 N. Y., 536, is in point. In the *Fitzsimmons* case the plaintiff was a public officer and was removed by his superior officer on grounds considered good and sufficient. The plaintiff was restored to his office by *certiorari* proceedings, it being held that he had been unjustly removed. During the period of removal this plaintiff secured employment elsewhere and earned a considerable sum of money. Upon being reinstated he brought suit for the salary of his office accruing during the period of removal. The defendant, the City of Brooklyn, attempted to urge set-off to the extent of moneys earned by the plaintiff in other employment during the period of removal. The Court of Appeals of the State of New York in affirming the judgment in favor of the plaintiff said, at page 538:

> "But this rule of damages has no application to the case of an officer suing for his salary and for the obvious reason that there

is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of any contract; but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at bar, and the courts below were right in refusing to diminish the recovery by applying the wages earned."

This Fitzsimmons case is one of the leading cases on the point under discussion and has been widely cited and followed in the various jurisdictions throughout the United States.

O'Neil vs. *State*, 223 N. Y. 40.
People vs. *Board of Police Commissioners*, 114 N. Y. 245.
Emmitt vs. *The Mayor*, 128 N. Y. 117.
Leonard vs. *The City of Terre Haute*, 93 N. E., 872.
Andrews vs. *City of Portland*, 79 Me. 484.
State vs. *Walbridge, et al.*, 153 Mo., 194.
Evevill vs. *Swan*, 20 Utah, 56.

This court has also heretofore held that the salary of a public office is an incident thereof:

Fisk vs. *Jefferson Police Jury*, 116 U. S., 131.

In fact this rule seems to be unquestioned:

28 Cyc. 449;
29 Cyc. 1367 and 1422.

In the instant case the appellant was restored to his office by the same Secretary of the Treasury who removed him. Thus it appears that there was a complete review of the first act and the decision was reached that appellant had been unjustly removed. Once again we submit that there is no question before this court involving the review of an administrative act. We recognize that the rule laid down by this Court in *Keim* vs. *U. S.*, 177 U. S. 290, has not been disturbed.

It is true that this appellant was restored to his office but the wrong done him has never been remedied; it will not be wholly remedied even with the return to him of the compensation belonging to his office for there was an injury done to his reputation that cannot be compensated for. However, this Court has the power, we take it, to give this appellant the salary of his office and that, in order to do so, it is only necessary to hold that his re-instatement by executive order intended and did restore to him the legal title to his office from the date of his removal. This would entitle him to all of the privileges or emoluments attached thereto.

WHEREFORE it is respectfully submitted that the judgment of the court below should be reversed and that appellant should recover the salary of

his office for the period elapsing between May 9, 1910 and December 15, 1912, at the rate of $1,600.00 per annum, amounting to $4,164.44.

Respectfully submitted,

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